| **Bosco Credit V Trust Series 2012-1 v Johnson** |
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| 2019 NY Slip Op 31073(U) |
| April 12, 2019 |
| Supreme Court, New York County |
| Docket Number: 850218/2015 |
| Judge: George J. Silver |
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Index № 850218/2015

SUPREME COURT OF THE STATE OF NEW YORK: Part 10
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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BOSCO CREDIT V TRUST SERIES 2012-1,

Index № 850218/2015
Motion Seq. № 004

**DECISION & ORDER**

Plaintiffs,

-against-

DEREK JOHNSON, , *et al.*,

Defendants

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**GEORGE J. SILVER, J.S.C.:**

This action was commenced to foreclose on a premises located at 51 Hamilton Terrace New York, NY 10027. By a decision entered on February 22, 2019, this court rendered judgment in favor of plaintiff BOSCO CREDIT V. TRUST SERIES 2012-1 ("plaintiff") as the rightful owner of the subject note and mortgage. The defendant mortgagors in the action (hereinafter "defendant Johnson" and "defendant Crawford," collectively "defendants") are husband and wife.

Defendant Johnson is an attorney, and formerly a senior vice president of AOL Time Warner and president of the Apollo Theatre, among other positions. Defendant Crawford is a Manhattan dentist. By this court's prior decisions and orders, it was found that defendants have failed to pay interest or principal on the mortgage loan since May 2008 or to pay real estate taxes and insurance for a similar period.

With the instant motion, defendants move for an order fixing the amount of an undertaking, as required by CPLR §5519(a)(6), prior to any stay of this court's Judgment of Foreclosure and Sale entered on February 22, 2019. Defendants request is for an undertaking in the amount of $500. In opposition, plaintiff requests an undertaking in the amount of $1,996,320.82. For the reasons discussed below, this court sets the undertaking at $1,458,320.82.

**DISCUSSION**

CPLR §5519(a)(6) provides as follows:

> (a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:
>
> (b) the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency……

This provision, by its very terms, was meant to apply to a judgment granting the right to possession, which plaintiff has obtained here. That is why it requires a bond to protect the plaintiff's interest in the event that defendants' appeal fails. The provision is invoked here by defendants, as the granting of their application would forestall their removal from the premises pending appeal provided that an undertaking set by the court is posted. While the statute is commonly employed in the context of eviction proceedings in housing court, here neither plaintiff nor defendants challenge its applicability to this foreclosure action.

In accordance with CPLR §5519(a)(6), the amount of a required undertaking must be based on the undertaking's ability to: (a) protect against potential waste to the premises; (b) safeguard payment of use and occupancy of the premises; and (c) guarantee payment of any deficiency.

Here, by declaring that an undertaking of $500.00 would protect plaintiff's interest in the premises, defendants overlook the requirement that the undertaking protect against waste as well as the loss of use and occupancy, and understate the potential for a deficiency.

To be sure, the court finds that defendants' assertion that "we have always taken good care of our [h]ome and will continue to do so" is inadequate to show that defendants will not commit waste during the pendency of a stay (*see Morgan v. Morgan*, 2 Misc.3d 1011(A), at *3, *4-5 [Sup. Ct. Kings Cnty. Apr. 16, 2004][finding that a defendant's promise not to commit waste was not an "undertaking"]). Conversely, plaintiff's opposition is accompanied by the affidavit of Glenn Murphy, Chief Operating Officer of Franklin Credit Management Corporation and servicing agent for plaintiff, who contends that the amount of $750,000.00 is reasonable to protect plaintiff against waste. That figure is accompanied by a recent appraisal of the premises as of April 8, 2019 that states that the property is worth $3,700,000.00. As the premises is only insured for $3,200,000.00, the court finds that were a loss to occur, and were plaintiff charged with protecting against waste not covered by insurance, a sum of at least $500,000.00 would be required. As such, the court finds $500,000.00 to be a reasonable calculation as to waste.

The court is not, however, persuaded by plaintiff's assertion that an undertaking in this matter include use and occupancy. To be sure, this is not a rental property, and the court does not believe that an analogy to proceedings in housing court is permissible as it relates to use and occupancy in a foreclosure context. Indeed, plaintiff does not cite persuasive authority in favor of such a finding. Hence, the court finds that use and occupancy is inapplicable in the current context.

The court does find, however, that defendants assertion that there can be no deficiency here because the value of the premises "substantially exceeds the amount of the [j]udgment and fully secures" plaintiff, is incorrect. Notably, the Referee's September 12, 2018 Report in this matter calculated a judgment in the amount of $3,763,984.53 as of August 20, 2018. From August 21, 2018, both pre-and post-judgment interest have accrued. Indeed, from August 21, 2018 through the entry of this court's judgment on February 22, 2019, the adjustable interest on the loan was 9.875% from August 21 through September 30, 2018 and 10.5% from October 1, 2018 through February 22, 2019. In addition, based on a conservative estimate concerning the length of the appeal in this action, plaintiff shall continue to make tax and insurance payments on the premises. Defendants estimate that they shall pay insurance in the amount of $1,657.60 each month for a likely total of $29,836.80, taxes in the amount of $2,400 each quarter for a likely total of $24,000.00, and water and sewage in the amount of $5,000.00 a year for a likely total of $10,000.00.[1]

Even if a foreclosure sale were to proceed on April 17, 2019, total costs would be in excess of $4,000.000.00, which is beyond the judgment amount set forth in the Referee's September 12, 2018 Report. As such, if the foreclosure sale is stayed, the amount that will be due to plaintiff several months from now while the appeal is pending will greatly exceed the present amount that plaintiff is scheduled to inherit as of April 17, 2019. Indeed, as calculated in plaintiff's accompanying affirmations, the amount that will be due to plaintiff eighteen months after the foreclosure sale that defendants seek to stay will be $4,658,320.82, which includes post-judgment interest on the $4,055,138.92 amount due as of April 17, 2019 and the taxes, insurance, and water/sewer bills to be paid by plaintiff going forward if the foreclosure sale is stayed. Thus, the

[1] These figures are based on the appeal pending for an estimated length of 18-months.

sum due will be $958,320.82 more than the $3,700,000 value of the premises. The court finds that plaintiff will be severely damaged if the undertaking does not cover this deficiency. Accordingly, the court finds that in addition to the $500,000.00 that an undertaking should encompass based upon waste, an additional $958,320.82 for a potential deficiency is warranted. As such, the court grants defendants' application for a stay to the extent that an undertaking is posted, and sets the undertaking in the amount of $1,458,320.82, which equals the sum of $500,000.00 for waste, and $958,320.82 for a potential deficiency. Accordingly, it is hereby

ORDERED that plaintiff is directed to serve a copy of this decision and order on defendants with notice of entry within three (3) days of its receipt; and it is further

ORDERED that defendants' application is granted only to the extent that a stay of this court's Judgment of Foreclosure and Sale entered on February 22, 2019 shall occur provided that defendants' post an undertaking in the amount of $1,458,320.82 within seven (7) days of service of a copy of this decision with notice of notice of entry; and it is further

ORDERED that the above-stated undertaking shall indemnify plaintiff for all damages and costs arising from this court's stay pending appeal; and it is further

ORDERED that if plaintiff fails to post an undertaking in the amount of $1,458,320.82 within seven (7) days of service of a copy of this decision with notice of notice of entry, plaintiff's failure to post the necessary undertaken shall foreclose this court's granting of any subsequent stays of the enforcement of its Judgment of Foreclosure and Sale entered on February 22, 2019.

This constitutes the decision and order of the court.

Dated: April 12, 2019

HON. GEORGE J. SILVER